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Nos. 89-927, 89-992 and 89-1011

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals has authority to vacate in part a settlement agreement in violation of the court's prior, outstanding mandate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-927

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

No. 89-992

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

No. 89-1081

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, 89-927 Pet. App. 1b-22b, is reported at 881 F.2d 494. The opinion of the district court, 89-927 Pet. App. 1j-30j, is reported at 687 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. A petition for rehearing was denied on September 15, 1989. 89-927 Pet. App. 1e-2e. The petition for a writ of mandamus or prohibition or, in the alternative for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081 were filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and 28 U.S.C. 1254(1).

STATEMENT

This case concerns the disposition of a several million dollar surplus remaining in the *Folding Carton* antitrust litigation settlement fund (known as the reserve fund). In the first of two decisions regarding the reserve fund, the Court of Appeals for the Seventh Circuit held that 28 U.S.C. 2042 requires the surplus to be deposited in the United States Treasury "in the name and to the credit of the United States." Subsequently, the parties to the class actions, with the approval of the district court, entered into settlement agreements that purported to disburse the reserve fund in a manner inconsistent with the court of appeals' mandate. The United States ultimately contested those agreements and sought to enforce the mandate of the court of appeals. In a second decision, which petitioners ask this Court to review, the court of appeals held that the agreements conflicted with the court's original mandate and must be set aside in part. At the same time, the court held that although its original mandate ran in favor of the United States, the United States is equitably estopped from seeking enforcement of the mandate and the statute on which it rests.

1. The present civil litigation grows out of a 1975 criminal antitrust suit brought by the United States against more than 70 manufacturers of folding cartons and their corporate officers. That suit charged the manufacturers and their

officers with conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The United States prevailed in that litigation against virtually all the defendants. See generally *United States* v. *Alton Box Board Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,336 (N.D. Ill. 1977).

In the wake of the government's successful criminal prosecution, customers of the folding carton manufacturers filed civil class actions and renewed the price-fixing allegations that underlay the criminal suit. The civil actions were consolidated in the United States District Court for the Northern District of Illinois. See *In re Folding Carton Antitrust Litigation*, 415 F. Supp. 384 (J.P.M.L. 1976).

In September 1979, all of the class actions were settled by the defendants' establishing a $200 million fund to be distributed to class member carton purchasers pursuant to an agreed-upon plan. Gov't C.A. App. 49. Disbursements from the settlement fund were processed by an Administration Committee appointed by the district court. Gov't C.A. App. 50.

2. After all payments to the class claimants were made, approximately $6 million remained in the settlement fund. Gov't C.A. App. 51. In February 1983, the district court issued an order governing the distribution of that surplus, which the court called the "reserve fund." 89-927 Pet. App. 1i.

The district court first determined that the antitrust defendants had no claim to legal ownership of the reserve fund because the settlement agreement provided for irrevocable transfer of the money to the settlement fund. 89-927 Pet. App. 15i. It next ruled that the previously paid plaintiff class claimants likewise had no legal claim to the remaining funds; under the settlement agreement, their recovery was a fixed percentage of their total purchases of relevant material

during the applicable period, a sum which they had already received. 89-927 Pet. App. 17i-18i. The court then held that the plaintiff class members who had failed to file timely claims also had no legal interest in the excess funds. 89-927 Pet. App. 20i-21i. Finally, the district court rejected any theory that the money escheated to either the State of Illinois or the United States. 89-927 Pet. App. 21i.

Turning from legal to equitable considerations, the district court determined that neither the antitrust defendants nor the previously paid claimants and their attorneys had valid equitable claims to the surplus funds. The court also determined, however, that the plaintiff class members who had not yet sought payments had cognizable equitable claims. 89-927 Pet. App. 24i-28i. Accordingly, the district court ordered that renewed efforts be made to locate any remaining plaintiff class members who had not made claims, and that the reserve fund be held for one year to meet any such late claims. 89-927 Pet. App. 33i-34i. At the end of that one-year period, the court ordered that surplus funds be transferred to a tax-exempt foundation established to study promotion of judicial management of complex litigation (primarily antitrust cases), to promote research and implementation of various aspects of the antitrust laws, and to pay possible future claims. *Ibid.*

3. Several defendants and plaintiff class members appealed the district court's ruling governing the disposition of the reserve fund. On appeal, the Court of Appeals for the Seventh Circuit affirmed that part of the district court's order holding that neither the defendants nor the previously paid claimants had any claim to the surplus funds. 89-927 Pet. App. 3g. The court of appeals also agreed that the surplus funds should be held for one year to cover any cognizable late claims by class members. 89-927 Pet. App. 4g.

But the court of appeals expressly reversed the district court's plan to use the remaining funds for a tax-exempt foundation, calling it a "miscarriage of justice and an abuse of discretion." 89-927 Pet. App. 4g. Instead, the court of appeals ruled that funds left over after payment of late claims must be disposed of pursuant to 28 U.S.C. 2041 and 2042. 89-927 Pet. App. 4g. Section 2041 provides that all funds "paid into any court of the United States" or "received by the officers thereof" in pending or adjudicated cases "shall be deposited forthwith with the Treasurer of the United States * * * in the name and to the credit of such court," subject to later delivery to "the rightful owners." Section 2042 provides that when "the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute," and the money has remained unclaimed for five years, the court then "shall cause such money to be deposited in the name and to the credit of the United States." Once this transfer has taken place, Section 2042 permits "[a]ny claimant entitled to such money" to obtain its money by petitioning the court and giving notice to the United States Attorney.

The court of appeals ruled that 28 U.S.C. 2042 governs the disposition of any surplus remaining in the reserve fund. 89-927 Pet. App. 4g-5g. The court noted that the "escheat" provided for by Section 2042 is not permanent because the United States must pay the funds to proper claimants if they appear. 89-927 Pet. App. 5g. The court of appeals did not remand the matter to the district court; rather, it used mandatory language specifying that the Administration Committee should hold the reserve fund available for one year and that the remainder of the reserve fund "shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042." 89-927 Pet. App. 6g.

In response to a rehearing petition, the court of appeals emphasized that its order "merely implements a direct

Congressional mandate for the disposition of residual funds deposited with a district court." *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1259 (7th Cir. 1984). The court of appeals explained that it had not simply substituted its equitable judgment for that of the district court, but rather had ordered disposition of the funds pursuant to the statutory requirement of Section 2042. The district court had abused its discretion because it lacked authority to establish a research foundation and to fund it with the unclaimed money from the reserve fund. 744 F.2d at 1260. The court of appeals clarified that its use of the term "escheat" to describe the process under Section 2042 was not meant "in the same sense as reference to escheats to the states." *Ibid.*

On October 11, 1984, the court of appeals denied a motion to stay its mandate. The court observed that no judge had requested en banc review, that its ruling disposing of the surplus in the reserve fund in accordance with 28 U.S.C. 2042 was clearly correct, and that this issue "seldom recurs." Gov't C.A. App. 16. Consequently, the court of appeals' mandate issued on October 17, 1984, and was entered on the district court docket sheet. Gov't C.A. App. 17. That mandate has never been recalled.

4. The United States had no involvement in the civil antitrust litigation up to that time. In December 1984, the parties notified the United States Attorney's Office in Chicago that the court of appeals had ruled that, after the year for late claimants had run, the United States was to take control of the surplus in the reserve fund pursuant to 28 U.S.C. 2042. At the same time, however, several parties had filed certiorari petitions in this Court, and the district judges who had presided over the district court proceedings themselves had filed a petition for a writ of mandamus or certiorari in this Court.

While the various petitions seeking this Court's review were pending, the parties—none of whom had a legal or equitable interest in the reserve fund after payment of late claims—negotiated a settlement agreement among themselves which disposed of the reserve fund in a manner contrary to the court of appeals' mandate. After payment of late claims by September 1985, the parties agreed—despite the unequivocal wording of the court of appeals' opinion—that they would divide the remaining money in two parts: one half would be paid *pro rata* to all previously compensated class members; the other half would be paid to two or more Chicago area law schools to fund research projects involving enforcement of the antitrust laws and management of complex litigation, and to assist law students in financial need.[1] Gov't C.A. App. 29-32.

The parties submitted this settlement proposal to the district court at a hearing on March 21, 1985. The district court recognized that the court of appeals' mandate had issued. But it asserted that the court of appeals' ruling—which the district court described as "silly"—was not "final" and therefore did not bind the district court. Gov't C.A. App. 20-22. (Paradoxically, the district court requested the parties to ask the court of appeals to extend the time for filing late claims. Gov't C.A. App. 23.) In any event, the district court stated that the parties "better" check with the U.S. Attorney's office to see "whether they have any position they want to take." Gov't C.A. App. 24. One of the attorneys for the parties apparently met with a supervising Assistant United States Attorney, who told him that the United States had no objection to the entry of the settlement. Gov't C.A. App. 58.

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[1] A copy of the proposed settlement was sent to the U.S. Attorney's Office on March 18, 1985. Gov't C.A. App. 57.

On March 27, 1985, the district court held a second hearing on the proposed settlement. Although it acknowledged one party's concern that the district court could not approve a settlement under the circumstances, Gov't C.A. App. 26, the court nevertheless did so. At the end of the hearing, counsel for some of the previously paid claimants told the court that, although no representative from the U.S. Attorney's office was present, that office had been consulted and had indicated "no objection to this resolution of the dispute." Gov't C.A. App. 28.

The settlement was signed by representatives of the parties on March 28, 1985, and was approved by the district court on April 1, 1985. No one signed the settlement on behalf of the United States. Gov't C.A. App. 29-32. In May 1985, the district judges and the parties moved to dismiss the petitions they had filed in this Court, and the various petitions were then dismissed under then-applicable Sup. Ct. R. 53 (1980). *In re Robson*, 471 U.S. 1120 (1985).[2]

In early 1986, a member of the claimant class that had not previously filed a claim, Anheuser-Busch Companies, Inc., moved to vacate the settlement. Anheuser-Busch asserted that the March 1985 settlement was "in direct contradiction to the mandate" of the court of appeals insofar as it provided for further payments to previously paid claimants and for grants to Chicago law schools. The company contended that only payment to late claimants would be consistent with the court of appeals' ruling.

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[2] Petitioner in No. 89-927 states that the petitions were "voluntarily dismissed as moot." Pet. 8. Under Rule 53.3, however, no mandate or other process is issued pursuant to the voluntary dismissal unless this Court directs otherwise. Because no mandate or process was issued by this Court, the Rule 53 dismissal in this case did not determine that the case was moot, nor did it vacate the Seventh Circuit's outstanding mandate.

Although the motion to vacate the settlement was fully briefed, the district court never ruled on it because the parties agreed to amend the March 1985 settlement to pay Anheuser-Busch and other late claimants. Gov't C.A. App. 36-37, 40. The district court approved this superseding settlement agreement in September 1986, even though it left intact the provisions of the March 1985 settlement that Anheuser-Busch had attacked as violative of the court of appeals' September 1984 ruling. Gov't C.A. App. 36-37. In December 1986, the district court ordered disbursement of approximately $0.6 million to late claimants and more than $1.7 million to previously paid claimants. Gov't C.A. App. 7.[3] There is no indication that the United States received advance or contemporaneous notice of the superseding settlement agreement or any of the other activities occurring after the March 1985 settlement.

5. In February 1987, an unpaid late claimant filed a *qui tam* action under seal pursuant to the False Claims Act, 31 U.S.C. 3729 *et seq*. The *qui tam* plaintiff contended that the settlement negotiated by the parties and approved by the district court violated 28 U.S.C. 2042 and the court of appeals' mandate.

Under the False Claims Act, the federal government had the option to decide whether or not to intervene and proceed with the litigation. While the Justice Department was considering whether to do so, in March 1987, the district court ordered that $1.2 million from the reserve fund be paid to Loyola University School of Law for one of the research projects contemplated by the March 1985 settlement. Gov't C.A. App. 8. The order allowed the school to use the interest generated by the principal amount with a reversionary interest in the district court. Six days later, the

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[3] At that point, the surplus in the reserve fund totaled more than $7 million. Gov't C.A. App. 59-60.

United States made an emergency motion to vacate or stay that order as violative of the court of appeals' mandate. Gov't C.A. App. 45-46.[4]

In May 1987, the Justice Department decided not to intervene in the *qui tam* action.[5] Shortly thereafter, in June 1987, the district court ordered that $156,000 of the reserve fund be transferred to the University of Chicago Law School for another research project contemplated by the March 1985 settlement. Gov't C.A. App. 9.

Several weeks later, on July 14, 1987, the United States moved to intervene in the district court pursuant to Federal Rule of Civil Procedure 24(a) and to vacate the settlement as violative of the court of appeals' mandate. The government argued that the district court lacked authority to enter an order disposing of the excess funds in a manner plainly in contravention of the appellate mandate, which had never been withdrawn or overruled and which therefore stood as the law of the case. The United States further argued that no representative of the United States had ever appeared in court to agree to the stipulated settlement; that the settlement was not signed by any representative of the United States; and that none of the parties had ever consulted with or received either written or oral approval from a representative of the United States authorized to settle a matter involving several million dollars. Because no one in authority had approved the settlement on behalf of the government, the United States urged that the settlement was a nullity.

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[4] At that time, the government notified the district court *in camera* of the pending *qui tam* action.

[5] That action was subsequently dismissed because the plaintiff was not a proper relator under the False Claims Act. The dismissal order was appealed to the court of appeals, which affirmed the dismissal of the *qui tam* action in the same decision now before this Court. 89-927 Pet. App. 17b-22b. No party has asked this Court to review the *qui tam* ruling.

On May 24, 1988, the district court denied the motions filed by the United States. It held that the motion to intervene was untimely, and in the alternative held that, even if the intervention request was timely, the motion to set aside the settlement must be denied. 89-927 Pet. App. 12j-22j. The district court offered three reasons for preserving the settlement agreement. First, it opined that the mandamus and certiorari petitions pending in this Court meant that the court of appeals' mandate "was not final at the time of the settlement" and therefore did not bind the parties or the district court. 89-927 Pet. App. 22j-23j. Second, the district court reasoned that the court of appeals had disapproved only the district court's exercise of its equitable power and had not taken away its power to approve a settlement stipulation, even if that stipulation was inconsistent with the appellate mandate. 89-927 Pet. App. 23j-24j. Third, the district court ruled that the U.S. Attorney had effectively joined the settlement agreement, thereby surrendering the United States' interest in the reserve fund, when members of the U.S. Attorney's Office indicated orally to lawyers for the other parties that their Office did not object to the settlement. 89-927 Pet. App. 27j-30j. The district court acknowledged that under long-established federal regulations, authority to compromise a claim of this magnitude rests solely with the Attorney General or the Deputy Attorney General, and that neither the United States Attorney nor his subordinates have authority to enter into such an agreement. See 28 C.F.R. 0.160(a)(2), 0.161, 0.168(a), and Appendix to Subpt Y, Sec. l(c)(2). But the district court held those regulations inapplicable because it deemed the settlement not to be a "money claim" within their terms. 89-927 Pet. App. 28j.

6. The United States petitioned the court of appeals for a writ of mandamus to enforce the court's earlier mandate

and appealed from the district court's order.[6]

In its mandamus petition, the United States relied on the plenary power of an appellate court to enforce its mandate. The government noted that the court of appeals' earlier mandate regarding the disposition of the reserve fund had obviously been violated, and that the parties could not devise among themselves (and the district court could not approve) a settlement contrary to the mandate, especially in a class action under Federal Rule of Civil Procedure 23. The United States renewed its contention that the U.S. Attorney lacked authority to surrender the interest of the United States in the reserve fund, and added that the government may not be bound by unauthorized oral statements from the U.S. Attorney's Office on any theory of estoppel. Finally, the United States contended that its intervention motion had been timely, but that, even if the motion was untimely, the United States was empowered to enforce the mandate as if it were a party under Rule 71 of the Federal Rules of Civil Procedure, which provides that when an order is made "in favor of a person who is not a party to the action," the person "may enforce obedience to the order by the same process as if a party."

The court of appeals affirmed in part and reversed in part. It recognized that the settlement agreement "was not in keeping with the mandate of this court," and that "it was not * * * the prevailing parties who purported to give the balance of the fund away, but the [Administration] Comm[ittee] and the district court, neither of which had any rights to the money they distributed." 89-927 Pet. App. 6b, 9b.

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[6] Because the court of appeals' original mandate did not remand the case to the district court, it is not clear that the district court had jurisdiction to enter further orders regarding the reserve fund.

Nonetheless, the court of appeals refused to permit the United States to enforce the terms of the court's original mandate, which had directed that the surplus funds be deposited in the Treasury "in the name and to the credit of the United States" as required by 28 U.S.C. 2042. The court of appeals considered at length whether the Department of Justice's regulations authorized the U.S. Attorney to consent to the settlement agreement, but although the court questioned the government's interpretation of the regulations, it ultimately declined to resolve that question. 89-927 Pet. App. 10b-13b. Instead, the court held that the United States was estopped from denying the authority of the U.S. Attorney's Office to consent to the settlement agreement. 89-927 Pet. App. 13b-14b. The court concluded that by virtue of this estoppel, "any interest the United States may have had under 28 U.S.C. § 2042 is extinguished." 89-927 Pet. App. 14b. The court indicated that the same considerations which supported estoppel made the government's attempt to intervene under Rule 24(a) untimely. 89-927 Pet. App. 14b.

Although the court of appeals held the United States estopped, it made no attempt to explain how the traditional requirements of estoppel were satisfied here, nor did it identify any affirmative misconduct on the part of the government. See 89-927 Pet. App. 13b-14b. Under established Seventh Circuit precedent, the government may not be estopped unless all of the traditional elements of estoppel are present and the government is further shown to have engaged in "affirmative misconduct." See, *e.g.*, *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982). The court of appeals alluded to this authority, but apart from noting that the U.S. Attorney's actions had prejudiced the other parties and the court's earlier mandate, the court offered no explanation for its estoppel ruling. 89-927 Pet. App. 13b.

Because the United States was deemed to have no further interest in the reserve fund, the court of appeals declined to disturb the distributions to the class claimants who had already been paid, despite the fact that the original Seventh Circuit panel had ruled that additional payments to previously compensated plaintiffs should not be made. 89-927 Pet. App. 14b.[7] At the same time, however, the court of appeals held that its mandate had been impermissibly violated by the grants to the law schools for antitrust research, a disposition which bore too close a resemblance to the research foundation the court of appeals had disapproved in its first opinion. 89-927 Pet. App. 14b-15b. Accordingly, the court of appeals ordered that the grants to the law schools be retrieved, and that the funds be distributed at the discretion of a new district judge under the *cy pres* doctrine. 89-927 Pet. App. 15b-16b.

The class plaintiffs and the district judge separately sought rehearing en banc. The rehearing petitions were denied without opinion on September 15, 1989. The district judge subsequently filed a petition for a writ of mandamus or prohibition or, in the alternative, a petition for a writ of certiorari on December 11, 1989 (No. 89-927). The class plaintiffs and the Administration Committee filed separate petitions for writs of certiorari on the same date (Nos. 89-992 and 89-1081).

ARGUMENT

More than six years have passed since the beginning of the controversy over the reserve fund, and the underlying class actions themselves will soon enter their fifteenth year. Like the petitioners – although for very different reasons –

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[7] The court did hold that no further payments could be made to this group, or to the defendants, or to any future late claimants. 89-927 Pet. App. 16b.

the United States disagrees with the court of appeals' latest ruling.[8] But the court's decision presents no legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court.

1. The sequence of events that led to the current decision of the court of appeals was highly irregular and is unlikely to recur. The controversy began with a substantial unclaimed remedial fund to which no private party had a valid legal claim. The conflicting claims to the fund led to a remedial order which was overturned on appeal. Certain of the parties then negotiated a post-appeal settlement that plainly violated the appellate mandate, but rather than seeking relief from that mandate in the court of appeals, the parties turned to the district court. The district court approved the settlement, then was met with a post-settlement motion for relief by the beneficiary of the original appellate mandate. Finally, when the beneficiary's motion for relief was denied, a second appeal ensued to determine the effect of the settlement and the original appellate mandate.

This is a sequence of events which, it may fairly be hoped, will not be repeated. Because the court of appeals' decision depends so heavily on the peculiar circumstances of this case, including the scope of the Seventh Circuit's own prior mandate and the events following that court's first decision, the latest ruling is not likely to have general significance beyond the confines of this case. For better or worse, the court of appeals saw its task as bringing an end to the near-interminable controversy over the disposition of the reserve fund. 89-927 Pet. App. 8b-9b. The court of appeals did not purport to establish, and did not in fact establish, any more general principles of law. In sum, this is a unique decision

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[8] The United States' disagreement with the court of appeals' estoppel ruling is described in our cross-petition in this case.

which rests on a unique set of facts, and its novelty counsels strongly against plenary review by this Court.

2. In an effort to invest the decision below with greater significance, the petitioners in No. 89-927 and 89-992 contend that the court of appeals disregarded settled limitations on its jurisdiction under Article III of the Constitution. 89-927 Pet. 11-17; 89-992 Pet. 3, 9-10. The petitioners argue, in essence, that if parties settle a case on terms inconsistent with a binding prior mandate of an appellate court, Article III bars the appellate court—even this Court—in all circumstances from enforcing its outstanding mandate. Cf. 89-927 Pet. 7. Under petitioners' theory, the settlement provides a safe harbor in which the parties can violate appellate mandates with impunity.

The short answer to petitioners' argument is that it is at odds with this Court's own precedents. Those precedents make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate.

For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust action, the Court noted that in an earlier opinion it had ordered "divestiture without delay," *id.* at 131. Divestiture did not take place as required by this Court's mandate, however, and parties who were denied intervention in the remand proceedings appealed. On appeal, the United States contended that the divestiture issues were not properly before the Court because the United States, as the antitrust plaintiff, had agreed to a settlement of the litigation after this Court's first ruling. *Id.* at 131-132, 136. This Court rejected that contention: "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise[,] has no authority to circumscribe the power of the courts to see that our mandate is carried out." *Id.* at 136.

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), on remand from this Court, the United States asserted that the district court could consider only the remedy proposed by the government. When the case returned to this Court, the appellees argued that the government was then estopped from urging other remedies before this Court. 366 U.S. at 325 n.6. The Court, noting its "plenary power" to see that the lower court followed its earlier ruling, rejected the appellees' argument because "no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out." *Id.* at 326 & n.6. See also *Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (Supreme Court not required to dismiss case, despite unanimous request by parties to do so, when case raises question of district court's compliance with Supreme Court's prior mandate).

The courts of appeals likewise insist that an appellate court's power to enforce its mandate is not terminated by a subsequent settlement that is at odds with the terms of the mandate. See, *e.g.*, *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) ("[e]ven at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court"); *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154, 155 (2d Cir. 1983) (the rule that a lower court must faithfully execute the mandate of the court of appeals "prohibits litigants from circumventing such lower-court compliance by stipulation or otherwise"). Thus, the court of appeals in this case was hardly departing from settled Article III jurisprudence, as the petitioners suggest, when it partially overturned the settlement agreements as contrary to its prior mandate.[9]

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[9] For similar reasons, the existence of the court of appeals' mandate vitiates petitioners' claims that the decision below undermines the set-

The petitioners' challenge to the court of appeals' power is particularly misconceived because this litigation involves the settlement of class action claims. Because class action settlements may affect interested persons other than those immediately before the court, Fed. R. Civ. P. 23(e) prohibits class actions from being compromised without the prior approval of the district court. We are aware of no authority, and the petitioners have offered none, that suggests that this authorization for district court review of proposed class action settlements runs afoul of Article III. And if a district court may review a class action settlement without exceeding its powers under Article III, it is difficult to imagine how Article III could bar an appellate court—including this Court—from undertaking the same task.[10]

Ironically, under petitioners' reasoning *no court*, not even the district court, had Article III jurisdiction because no live case or controversy existed with respect to the reserve fund. At the time the parties to the civil antitrust litigation entered into negotiations over the fate of the reserve fund, the district court had ruled, and the court of appeals had affirmed, that no party had a legal or equitable interest in any amount remaining in the reserve fund after payment of late claims. It is difficult to visualize how the "parties"

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tlement process and discourages attorneys from serving on administrative committees. 89-927 Pet. 17-20; 89-1081 Pet. 2. The prior, outstanding appellate mandate provided ample notice that the parties could not enter into settlement negotiations directly contrary to the mandate, and that the members of the Administrative Committee should not expect compensation for professional services rendered to make disbursements inconsistent with that mandate.

[10] Petitioners' generic authorities merely state that a court may not act in the absence of jurisdiction and a live case or controversy. See 89-927 Pet. 13 n.14, 14-15; 89-992 Pet. 9-10 & n.2. The cited cases shed little light on the question whether the court of appeals had jurisdiction to enforce its prior, outstanding mandate.

could compromise a "dispute" over money to which they had no greater claim than any other citizen of the United States.

3. The only other contention by the petitioners which merits comment is their claim that the decision in this case conflicts with this Court's decision in *United States* v. *Munsingwear*, 340 U.S. 36 (1950), and its progeny. That claim is simply incorrect.

In *Munsingwear*, this Court held that when a case becomes moot during the course of appellate review through "happenstance," the party seeking appellate review is entitled to have the judgment of the lower court vacated. 340 U.S. at 39-40. This Court has applied the *Munsingwear* rule only when a case has become moot "due to circumstances unattributable to any of the parties." *Karcher* v. *May*, 484 U.S. 72, 83 (1987). Even when *Munsingwear* applies, moreover, a party that has *failed* to avail itself of its right to have a lower court judgment vacated may not thereafter avoid the effects of the judgment. In *Munsingwear* itself, this Court held that the United States was bound by a prior district court judgment, even though the case had become moot on appeal, because the United States had not asked the court of appeals to vacate the district court's judgment. 340 U.S. at 38-41.

In this case, even if one assumes that the parties' March 1985 settlement agreement rendered the controversy over the reserve fund moot, that the resulting mootness came about because of "circumstances unattributable to any of the parties," *Karcher*, 484 U.S. at 83, and that an ungranted petition for discretionary review should be treated the same as an appeal as of right for purposes of the doctrine governing mootness on appeal—even if all these prerequisites are assumed—then petitioners still had to respect the outstanding court of appeals' mandate because they failed to have it vacated as moot. Cf., *e.g.*, *Walker* v. *City of*

Birmingham, 388 U.S. 307, 316-317, 320-321 (1967) (parties may not ignore injunction notwithstanding strong arguments that statute authorizing injunction was facially overbroad under the First Amendment and that injunction itself contravened the First Amendment); *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947) (parties may not ignore injunction issued by court arguably without jurisdiction to do so). Indeed, petitioners occupy no better position than did the United States in *Munsingwear*, which forfeited its right to have the district court judgment vacated and was accordingly bound by the judgment thereafter. The parties here did not seek to have the court of appeals' mandate vacated when they dismissed their petitions before this Court. For that reason, *Munsingwear* is entirely consistent with the court of appeals' enforcement of its mandate in this case.

As petitioners observe, several courts of appeals have gone beyond *Munsingwear* to hold that a district court's judgment must be vacated if the parties settle their controversy on appeal, while other courts have held that the judgment need not be vacated in such circumstances. Compare *Federal Data Corp.* v. *SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-280 (Fed. Cir. 1987), and *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986), with *National Union Fire Ins. Co.* v. *Seafirst Corp.*, No. 88-3970 (9th Cir. Dec. 12, 1989), and *In re Memorial Hospital*, 862 F.2d 1299, 1301-1303 (7th Cir. 1988). In each of these cases, however, the issue was whether a party that has acted in a timely fashion is entitled to have a lower court's judgment vacated—not whether, as here, the party may disregard the judgment with impunity when it has "slept on its rights," *Munsingwear*, 340 U.S. at 41, by failing to apply for vacatur. Thus, even assuming that the conflict identified by petitioners merits this Court's attention, this case is not an appropriate vehicle to resolve it.

CONCLUSION

The petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081, should be denied.

Respectfully submitted.

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